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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. OSBALDO CASTRO MARQUEZ, Defendant and Appellant.	A154469 (Contra Costa County Super. Ct. No. 5-930026-0)

Defendant Osbaldo Castro Marquez appeals the denial of a motion to vacate his convictions under Penal Code section 1473.7.[1] He contends the court erred in finding no ineffective assistance of counsel or prejudice as a result of the alleged failure by trial counsel to advise him of the immigration consequences of his plea. We conclude that recent amendments to section 1473.7, which clarify that relief under that statute need not be based on a finding of ineffectiveness of counsel so long as the defendant shows an error that damaged his "ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere" (§ 1473.7, subd. (a)(1)), did not change the principle that a defendant's self-serving declaration, standing alone, may be insufficient to support an order granting relief. We affirm.

[1] Further statutory references are to the Penal Code unless otherwise indicated.

I. BACKGROUND

Defendant is originally from Mexico. In 1992, he entered the United States on a tourist visa and has not left since that time. Also in 1992, officers executed a search warrant at a home occupied by defendant and found two pounds of marijuana and three and a half ounces of cocaine, along with a gun, in his bedroom. The officers also located a triple beam scale, a magazine cut up into small squares commonly used to package illegal drugs, a pay-owe sheet recording drug sales to various individuals and $300 cash. Based on her training and experience, the detective who served the warrant believed the drugs were possessed for sale.

In 1993, defendant pled guilty to possession for sale of narcotics and possession for sale of marijuana and admitted being armed with a firearm in the commission of the first offense. (Health and Saf. Code, §§ 11351, 11359; § 12022, subd. (c).) He was placed on 365 days summary probation, conditioned on 365 days of jail time, as a result of his plea.

In 2018, defendant filed a motion to vacate his 1993 drug convictions pursuant to section 1473.7, arguing his trial counsel was constitutionally ineffective because he did not advise him of the immigration consequences of his plea and did not enter an "immigration safe" plea.[2] Along with his motion, defendant submitted a declaration in which he stated he was from Mexico but had lived in the United States for 27 years; that he had not been made aware of the immigration consequences of his plea by defense counsel, the court or anyone else and was ignorant of those consequences when he pled; that he first became aware of the immigration consequences when he was placed in a federal removal proceeding and informed he had pled to an aggravated felony; that he would not have entered a guilty plea if he had been aware his convictions made him deportable and inadmissible, but would have instead sought "an alternative immigration safe plea or a trial by jury;" and he believed he had a "strong case" to go to trial.

[2] We understand this to mean a plea to a crime that has no (or lesser) adverse immigration consequences compared to the charged offense. (See *People v. Tapia* (2018) 26 Cal.App.5th 942, 955.)

The trial court ruled that defendant had not carried his burden of establishing an entitlement to relief under section 1473.7 and denied his motion without prejudice.[3] The court indicated that it would need the transcript of the change of plea hearing to grant relief. It also indicated that defendant had not established that the immigration consequences defendant faced had anything to do with his trial counsel's performance: "I mean, this is such a slam dunk. There's nothing that his lawyer –I mean, you kind of go into ineffective counsel on this also, and under the case law and looking at what happened here, there is nothing that would have been different. . . . it was a search warrant. They came, they found all of the drugs packaged; they found the gun; they found – and large quantities of drugs; then back then, because we didn't have our computers that everyone has, he has his pay-owe sheets all written out . . . [¶] . . . [¶] so he was going to go down for drug dealing no matter what. His lawyer could have told him until he's blue in the face what the consequences are."[4]

II. DISCUSSION

A. *Standard of Review*

Defendant did not brief the standard of review applicable to the instant appeal. The People contend our review of defendant's motion to vacate is for abuse of discretion. In *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 (*Ogunmowo*), the court applied a

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[3] The Attorney General suggests the ruling may not be ripe because it was made without prejudice. We assume the arguments raised by defendant are sufficiently concrete to be ripe for review. (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.)

[4] The court also suggested defendant could not meet the criteria for section 1473.7 unless he could show he was not being deported for reasons independent of his convictions, for example, because he had overstayed his tourist visa. His attorney represented that while defendant was not being deported *because* of his convictions, those convictions made him ineligible for certain procedures that would allow him to return to or remain in the United States. Although our resolution of this matter makes it unnecessary to address this issue (which was not raised by defendant), we assume defendant was sufficiently aggrieved by virtue of the convictions to invoke section 1473.7. (See *People v. Morales* (2018) 25 Cal.App.5th 502, 508, 514 [defendant need not face removal proceedings to invoke section 1437.7].)

de novo standard, which requires a reviewing court to accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but to exercise its independent judgment in deciding whether those facts warrant relief. Even under the de novo standard of review, defendant has not established his entitlement to relief under section 1473.7.

B. *Law Concerning Advisement of Immigration Consequences at Time of Plea*

Criminal convictions may have dire consequences under federal immigration law for noncitizens faced with deportation, exclusion from admission to the United States or denial of naturalization. (*People v. Martinez* (2013) 57 Cal.4th 555, 563 (*Martinez*).) Since 1978, courts taking a plea have been required to advise the defendant, "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (§ 1016.5, subd. (a); see *Martinez*, at pp 561–564.) Lack of the advisement can be grounds for withdrawal of the plea. (§ 1016.5, subd. (d).) Although it was not until 2010 that the Supreme Court of the United States held that a claim for ineffective assistance of counsel may be based on an attorney's failure to advise a defendant about the immigration consequences of a plea (*Padilla v. Kentucky* (2010) 559 U.S. 356, 359–360), and this decision is not retroactive (*Chaidez v. United States* (2013) 568 U.S. 342 [133 S.Ct. 1103, 1113]), California law had recognized by 1987 that if a defense attorney gives immigration advice, it must be accurate. (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1477–1482 (*Soriano*).)

Thus, when appellant entered his plea in 1993, courts accepting a plea were required to advise a defendant it might have immigration consequences and defense counsel had a duty to ensure that any immigration advice they provided was accurate, though they did not necessarily have a duty to provide such advice in the first place.

C. *Section 1473.7*

Section 1473.7 became operative January 1, 2017 and authorizes a person who is no longer in criminal custody to move to vacate a conviction or sentence where the

"conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1);*Ogunmowo, supra*, 23 Cal.App.5th at p. 75.) Section 1473 .7 was designed to remedy the failure of then-existing California law to provide a means for a person who is no longer in criminal custody to challenge a conviction due to an error that affected his or her ability to meaningfully understand the actual or potential immigration consequences of the conviction. (Sen. Com. on Pub. Safety, Purpose of Assem. Bill No. 813 (2015–2016 Reg. Sess.) May 10, 2016, p. 1.)

In the two years following the enactment of section 1437.7, "courts uniformly assumed . . . that moving parties who claim prejudicial error was caused by having received erroneous or inadequate information from counsel, must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing norms, as well as a reasonable probability of a different outcome if counsel had rendered effective assistance. Those courts either expressly or impliedly followed the guidelines enunciated in *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 (*Strickland*).)" (*People v. Camacho* (2019) 32 Cal.App.5th 998 (*Camacho*).)

Effective January 1, 2019, section 1473.7, subdivision (a)(1) was amended to expressly state: "A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." (§ 1473.7, subd. (a)(1); Stats. 2018, ch. 825, § 2.) This amendment is a clarification of former law, and it applies to defendant's motion even though that motion was brought before the amendment went into effect and even though the section 1473.7 motion in this case was based primarily on counsel's failure to provide adequate advice concerning the immigration consequences. (*Camacho, supra*, 32 Cal.App.5th at pp. 1005–1009.)

A defendant seeking relief under section 1473.7 must show "prejudicial error" (§ 1473.7, subd. (a)(1)), which, under the statute, "is not limited to the *Strickland* test of prejudice, whether there was [a] reasonable probability of a different outcome in the original proceedings absent the error." (*Camacho, supra*, 32 Cal.App.5th at pp.

1009–1010.) The question is not whether the defendant would have received a more favorable outcome in the case overall or whether the defendant would have been convicted of the same crimes even if he had proceeded to trial. (*Id.*, at pp. 1010–1012.) Instead, the focus is on whether the defendant would have rejected the plea if he had known of its immigration consequences. (*Ibid*.) In some cases, a defendant "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." (*Lee v. United States* (2017) __ U.S. ___ [137 S.Ct. 1958, 1967–1967 (*Lee*).) The defendant shows prejudice if he can convince the court "he would never have entered the plea if he had known that it would render him deportable." (*Camacho, supra*, 32 Cal.App.5th at pp. 1011–1012.)

D. *Analysis*

As the moving party with the burden of proof by a preponderance of the evidence (§ 1473.7, subd. (e)(1)), defendant did not provide a complete record of the prior proceeding. No transcript of the change of plea hearing was before the court, defendant presented no corroborating evidence from former counsel or from the deputy district attorney who prosecuted his criminal case, and there is no evidence that either of the two was unable or unwilling to provide a declaration or testify. Additionally, defendant's declaration does not show he had any personal knowledge of what former counsel did or failed to do as far as investigating or negotiating for viable "immigration safe" plea options.

The trial court had a duty at the time of the plea to advise defendant of the immigration consequences. (§ 1016.5.) Case law had found counsel ineffective for failing to provide adequate advice regarding the consequences of a plea. (*Soriano, supra*, 194 Cal.App.3d at p. 1482.) Here, defendant's bail was increased based on an application by a police officer that stated he was an "alien resident," and a Spanish-speaking interpreter was provided, thus suggesting that counsel and the court knew of his status as a noncitizen. But the court that heard the motion to vacate in 2018 did not have the record to assess whether, despite the existing duties placed on counsel and the court in

1993, and despite their likely knowledge that appellant faced immigration consequences if he pled guilty, they failed to provide adequate advice on the subject.

Defendant states in his declaration that he received no advice from either defense counsel or the court regarding the immigration consequences of his plea. However, "[a]n allegation that trial counsel failed to properly advise a defendant is meaningless unless there is objective corroborating evidence supporting [defendant's] claimed failures. . . . [T]he 'easy' claim that counsel gave inaccurate information further requires corroboration and objective evidence because a declaration by defendant is suspect by itself. The fact is courts should not disturb a plea merely because of subsequent assertions by a defendant claiming his lawyer was deficient. The reviewing court should also assess additional contemporaneous evidence." (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223–224.) "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee*, *supra*, 137 S.Ct. at 1967; see *In re Alvernaz* (1992) 2 Cal.4th 924, 938; *People v. Araujo* (2016) 243 Cal.App.4th 759, 763.)

Other than assertions in his declaration, defendant presented no contemporaneous evidence substantiating that, but for a lack of advice regarding immigration consequences, defendant would have rejected the plea and proceeded to trial. At the time of his plea, defendant had been in this country only a short while and was facing up to five years in prison on the firearm enhancement alone. (See *People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1661.) The plea gave him a year in jail and probation. Defendant stated in his declaration that at the time he changed his plea, former counsel did not tell him he might have immigration problems in the future. Significantly, however, defendant did not state he asked former counsel about this subject, suggesting that immigration consequences were not a primary consideration for him at the time. (Cf. *United States v. Bonilla* (9th Cir. 2011) 637 F.3d 980, 985 [defendant's wife asked investigator and attorney if defendant would be deported, which demonstrated matter was of considerable importance to Defendant].) The trial court reasonably inferred defendant

was unlikely to prevail at trial, having been apprehended with a large quantity of drugs and a gun in his bedroom, which was searched pursuant to a warrant to which no legal challenge was apparently raised. The unlikelihood of prevailing on a charge does not equate to lack of prejudice in this context, since the focus is on whether the defendant would reject the plea, not on the ultimate outcome of the case. (*Lee*, *supra*, 137 S.Ct. at p. 1966.) But, "[w]here a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one." (*Ibid*.) That defendant's plea resulted in only one year in jail followed by summary probation calls into question his statements that he would have rejected the plea and its lenient disposition. (See *Lee*, *supra*, 137 S.Ct. at p. 1966 ["A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial"].)

Finally, defendant's suggestion of a viable alternative plea bargain with mitigated immigration consequences lacks support in the record. (See *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1118 [rejecting ineffective assistance claim where defendant failed to "identify any immigration-neutral disposition to which the prosecutor was reasonably likely to agree"].) Though defendant posits he "could have done more time in exchange for not having immigration consequences," he offered no evidence that the prosecution would have negotiated at the time of the plea based on immigration consequences or that "immigration safe" pleas were available at the time. (See *Martinez*, *supra*, 57 Cal.4th at p. 568.) On this record, it is pure speculation that an alternative plea with mitigated immigration consequences could have been negotiated. We are cognizant that before ruling on his motion to vacate in 2018, the court rejected a proposed deal between the deputy district attorney and the defendant "[t]o nunc pro tunc this to a PC 32, [accessory after the fact] with 364 days in county jail, as again, nunc pro tunc." The deputy's willingness to accept a plea to an accessory charge today does not show that a different deputy would have accepted the plea back in 1993. Defendant does not challenge the rejection of this 2018 agreement on appeal.

In sum, we conclude the trial court properly denied defendant's motion to vacate his conviction. While nothing in our opinion today precludes a motion based on additional evidence such as the change of plea transcript or a declaration by trial counsel, the trial court did not err in ruling as it did on this record.

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.